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SOCIETY FOR PROMOTING THE AMENDMENT
OF THE LAW.

R E P O R T

OF

THE COMMITTEE OF COMMON LAW

ON

EVIDENCE OF PARTIES.

LONDON:

1848.

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LONDON :
SPOTTISWOOD & SHAW,
New-street-Square.

SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.

COMMON LAW COMMITTEE.

THE following reference was made to the Committee : —

“ To consider whether parties to the record, both at Law and in Equity, should not be competent witnesses in their own favour, and liable to compulsory examination at the instance of their opponents.”

REPORT.

Your Committee have considered the above reference, and beg to answer in the affirmative the questions involved therein. When a matter is submitted to the decision of any persons, be they judges or jurors, it is obviously of the last importance that those persons should be made acquainted with the real circumstances of the case before them ; and it is equally obvious that the real circumstances are usually best known, and are often only known, to the litigating parties themselves. If then, the parties to the record were as willing as they are able to narrate events as they really happened, they would of course be the best witnesses that could be produced ; but inasmuch as they are often deeply interested in the result of the cause, and are consequently exposed to the temptation of colouring or misstating the facts, it has been hitherto supposed, at least at common law, that their testimony could not be received without endangering the best interests of morality,

and embarrassing the investigation of truth. In other words, the admissibility of the testimony of parties has been objected to on the twofold ground that it is calculated to increase the crime of perjury, and to mislead the Court or jury.

Let us consider these objections in their order ; and first, as to the temptation to commit perjury. The importance of this objection appears to your Committee to be greatly overrated. So long as parties, like other witnesses, are liable to a rigid cross-examination, it matters comparatively little what amount of interest they may have in withholding or perverting the truth. The dread of detection and of consequent punishment, even in the absence of every moral sentiment, will in the great majority of instances check the commission of perjury. The *party* knows that his testimony will be sifted with more than ordinary care, and this knowledge must have a tendency to restrain any inclination to falsehood. This very objection, be it remembered, was urged most loudly when Lord Denman brought in his bill to admit the testimony of interested witnesses. It did not then prevail, but the bill became the law of the land, and the practical working of that great measure has since amply demonstrated the invalidity of the reasoning on which the objection rests. Besides, if the admitting parties to be witnesses would sometimes occasion perjury, it cannot be doubted but that at other times its effect would be to prevent the commission of that crime. For, who that practises in courts of law but must acknowledge, that one of the most frequent and dangerous forms of perjury is that which affects to narrate the admissions of one or other of the parties to the record ? A witness for the plaintiff, for instance, distinctly swears that he called upon the defendant on a certain occasion, and that the defendant then acknowledged the justice of the plaintiff's demand. The scene is laid where no third person was present ; the defendant cannot himself be called to contradict the statement of the witness. The interview has perhaps taken place to the knowledge of the defendant's servant, and the servant to this extent corroborates the testimony of the witness. Cross-examination is obviously ineffectual. The witness tells his story in a calm and plausible and connected manner ; he is believed, and the defendant

unjustly loses the verdict. Now, if in such a case, and there are many such, the defendant were capable of himself giving testimony, not only would the jury be better enabled, by contrasting the manner of the two witnesses and the probability of their opposite statements, to form a correct decision, but the false witness would hesitate much before he would tell a tale which he knew full well would be flatly contradicted; and even if he did venture to enter the box, the mere knowledge of the fact that he was uttering falsehoods, and that another witness could and would be called to make an opposite statement, would often have the effect of rendering his story incoherent and his manner suspicious, and would thus prevent any credit from being given to his testimony. On the whole, therefore, your Committee consider that the crime of perjury would not to any serious, if indeed to any, extent be increased by a law which should render parties to the record competent witnesses. But even if they have come to an erroneous conclusion on this head, and if the crime of perjury would in point of fact be increased by such a law, they are by no means prepared to condemn its introduction on that ground alone. The folding of sheep by night on lands at a distance from the homestead, no doubt affords facilities for sheep-stealing; the exposure of goods in front of shops leads to larceny; nocturnal travelling may tempt to the commission of highway robbery; but no one thinks of prohibiting these innocent acts on the ground that they hold out temptations to crime. Why is this? Because the inconveniences that would result from such a prohibition would be felt far more by the public than those engendered by a partial increase in the number of offences. So, in the case under discussion, your Committee consider that the advantages derivable to the cause of truth from the examination of persons best conversant with the facts, would far more than counter-balance any evils which the cause of morality would be likely to sustain, from the crime of perjury becoming somewhat more frequent. In all cases of this kind, the legislature must be content to decide on a balance of evils; for even the best human measures are not exempt from some inconveniences.

But, secondly, it is urged that the testimony of parties

should be withheld, because it is calculated to mislead the Court and the jury. This objection your Committee think entitled even to less consideration than the one already discussed; for, in the first place, they consider, as already intimated, that, as a general rule, parties would be found to tell the substantial truth; and next, they entertain no doubt, but that as, where parties are made witnesses, the motive to deceive is at least as apparent as it is strong, the Court and the jury would naturally sift with proportionate suspicion the testimony of such persons, and, being on their guard, would refrain from giving implicit credit to statements, which, coming from a less suspicious quarter, would demand unhesitating belief.¹ Besides, the very circumstance of the parties themselves being examined would not unfrequently prevent the jury from being misled; for their examination would afford an opportunity, which is at present often wanted, of ascertaining the motives, characters, and interests of the witnesses called on their respective behalves, and might thus furnish a clew whereby to determine the relative amounts of credit due to such witnesses.

Your Committee, having now answered the two main objections to the plan proposed, beg leave to call the attention of the Society to those cases in which the law at present allows parties to be examined. For instance, at our Police Courts, in Courts-martial, in the new County Courts, and in most of the summary proceedings before magistrates, parties are allowed to tell their own tales, and not only is no inconvenience felt from the prevalence of this practice, but it is unquestionably productive of great advantage. Your Committee have sought for information on this subject from several of the Judges and officers of the County Courts, and the almost uniform answer to their inquiries has been that the system of examining the parties themselves has in those Courts worked extremely well. So also in criminal prosecutions, which, though nominally instituted in the name of the Crown, and having for their declared object the satisfaction of public justice, are in fact carried on at the instance of the injured

¹ See Taylor on Evidence, § 953.

party, who, in some cases, is even entitled to the restitution of his property on conviction of the offender,—the prosecutor has ever been admitted as a competent witness; and there is no pretence for asserting that the fountains of justice have been defiled by the contaminating influence of such testimony. In the Irish Civil Bill Courts parties may be compelled to testify as witnesses for their opponents; and a clause enabling arbitrators to examine at their discretion the litigating parties, is now inserted almost as a matter of course in all orders of reference. Again, in the Superior Courts of law, affidavits sworn by either party, may in general be read in support of, or in opposition to, any *interlocutory* motion; and in Equity, not only is the sworn answer of the defendant admitted as evidence against him in all cases, and for him in some, but however deeply he may be interested in the question involved in the cause, he may, in almost every instance, by the express provision of Lord Denman's Act, be examined as a witness on behalf of the plaintiff or of any co-defendant. Moreover, a clause is now uniformly introduced in the order of reference to the Master, enabling him to examine both parties on interrogatories.

In considering these exceptions to the general rule which rejects the testimony of parties, one is naturally inclined to ask, how is it possible to reconcile the law with the exceptions; or, in other words, how can both, at one and the same time, be founded on principles of justice and expediency?

If it be right and advisable that parties to the record should be admissible witnesses in the County Courts, on what ground can their testimony be rejected at *Nisi Prius*? If the law be sound which enables plaintiffs in equity to appeal to the oaths of defendants, why should not plaintiffs at law have the same powers; and why should not defendants either at law or in equity be authorised to examine their adversaries as witnesses? These questions are far easier asked than answered. Indeed, your committee are of opinion that they do not admit of a satisfactory answer. In practice, nothing can exceed the absurdity and injustice occasioned by the above anomalous state of the law. An action is brought at common law, and the defendant feels that he has no defence unless he can

examine the plaintiff on his oath. This he is not allowed to do; and, therefore, if he be a poor man, his case is hopeless. But if he be sufficiently wealthy to bear the costs of a bill in equity, the result may be very different, for what cannot be effected by direct means may be indirectly obtained; and the plaintiff, albeit an inadmissible witness at common law, may be made a defendant to a suit for discovery; and by this cumbersome and costly process, his action may be defeated by his own testimony. Thus the fate of the action will depend on the length of the defendant's purse. Again, a suit is instituted in Chancery, and the defendant, though himself compellable to put in his answer on oath, has no direct means of examining the plaintiff; but his sole remedy, unless the writ be one which admits of a reference to the Master, is to institute, in his turn, proceedings against his opponent, or, in the language of the law, to file a cross-bill. In the one case the merits of the cause cannot be determined rightly without having recourse to two courts; in the other without having recourse to two suits in the same court. Surely these instances of gross defects in the law require no further comment.

Your Committee, therefore, beg merely to convey to the Society their decided opinion, that the time has now arrived when it has become expedient to enact, that, excepting in the case of actions for criminal conversation, which, for obvious reasons, should be excluded from any general rule, all parties to the record, whether at law or in equity, should be competent witnesses in their own favour, and be liable to compulsory examination at the instance of their opponents.

THE END.

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